Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

ELWOOD "JACK" CLUCK,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL APPENDIX

ELWOOD CLUCK, Petitioner
No. 2 Comanche Spur
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ELWOOD "JACK" CLUCK,	)	
	)	
Plaintiff,	)	Civil Action No.
	)	SA-99-CA-1417-EP
VS.	)	
	)	Crim. Action No.
UNITED STATES	)	
OF AMERICA,	)	SA-95-CR-99(1)-EP
	)	
Defendant.	)	

ORDER

(Filed Jul. 25, 2000)

On this date the Court considered the Memorandum and Recommendation of the United States Magistrate Judge, entered June 8, 2000, and the Petitioner's objections to the Magistrate's recommendation, filed June 21, 2000. After careful consideration, the Court will accept the Magistrate's conclusion that this case should be dismissed.

Where no party has objected to the Magistrate Judge's Memorandum and Recommendation, the Court need not conduct a de novo review of it. *See* 28 U.S.C. §636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made"). In such cases, the Court need only review the Memorandum and Recommendation and determine whether it is either clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989).

On the other hand, any Memorandum or Recommendation that is objected to requires de novo review by the Court. Such a review means that the Court will examine the entire record and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Commission*, 834 F.2d 419, 421 (5th Cir. 1987).

The Court has conducted the requisite de novo review of this case. The Court agrees with the Magistrate that the current application must be construed as a motion to vacate or set aside a sentence under 28 U.S.C. section 2255.[1] Because Petitioner filed a section 2255 application on May 18, 1998,[2] which was dismissed on its merits, this application is successive.[3] Moreover, the

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[1] The Magistrate rejects the Petitioner's claim that he has filed a writ for coram nobis relief on the grounds that Rule 60(b) of the Federal Rules of Civil Procedure has abolished such relief. The United States Court of Appeals, however, has held that coram nobis relief is still available with respect to criminal convictions. *See United States v. Drobny*, 955 F.2d 990, 996 (5th Cir. 1992); *Correa-Negron v. United States*, 473 F.2d 684, 685 (5th Cir. 1973). However such relief is only available when a petitioner is no longer in federal custody. *Correa-Negron*, 473 F.2d at 685. Where a petitioner is still in custody, relief must be sought pursuant to 28 U.S.C. section 2255. *Id.*

[2] This motion was filed as a writ for coram nobis; for the reasons addressed in the footnote above, it must be construed as a section 2255 motion.

[3] Because the Court finds that the May 18 application renders this motion successive, it expressly does not approve or disapprove of the Magistrate's opinion that the Petitioner's writ of habeas corpus, filed in the Southern District of Texas, Corpus Christi Division, does so. *See Pack v. Yusuff*, No. 99-60283, 2000

Petitioner has taken his arguments to the United States Court of Appeals for the Fifth Circuit, and the arguments have been rejected by that court. Therefore, the Court agrees with the Magistrate that this case should be dismissed.

ACCORDINGLY, it is ORDERED that this case is DISMISSED.

SIGNED and ENTERED this 25th day of July, 2000.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

WL 942919, at *2 (5th Cir. July 10, 2000) (writ of habeas corpus and motion to vacate sentence are separate forms of relief); *Chambers v. United States*, 106 F.3d 472, 475 (2d Cir. 1997) (motion to vacate is not successive to application for writ of habeas corpus).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ELWOOD "JACK" CLUCK, Plaintiff,	)	
VS.	)	Civil Action No. SA-99-CA-1417-EP
UNITED STATES OF AMERICA,	)	SA 95 CR 99(1) EP
Defendant.	)	

JUDGMENT

(Filed Jul. 25, 2000)

In accordance with this Court's Order of this same date, it is hereby ORDERED, ADJUDGED, and DECREED that the application is DENIED, and this case is DISMISSED.

SIGNED and ENTERED this 25th day of July, 2000.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ELWOOD "JACK" CLUCK, Plaintiff,	)	87 95 CR 99
VS.	)	Civil Action No. SA-99-CA-1417-EP
UNITED STATES OF AMERICA, Defendant.	)	

ORDER

(Filed Sep. 25, 2000)

On this date the Court considered the Petitioner's motions for reconsideration, for findings of fact and conclusions of law, and for a certificate of appealability. After careful consideration, the Court will grant the motion for reconsideration, in part. However, the Court will again deny the underlying motion to vacate and will also deny the motions for findings and for a certificate of appealability.

On July 25, 2000, this Court dismissed Petitioner's 28 U.S.C. section 2255 motion to vacate and set aside his conviction, judgment, and sentence, concluding that the motion was successive and thus could not be filed without authorization by the United States Court of Appeals for the Fifth Circuit. *See* 28 U.S.C. § 2244(b)(3)(A) (a second or successive section 2255 motion may not be filed until authorized by a panel of the appropriate court of appeals). The Court now concludes that the determination that this motion was successive was erroneous.

A second section 2255 motion is successive if it (1) raises a claim challenging the movant's conviction or sentence that was or could have been raised in an earlier petition or (2) otherwise constitutes an abuse of the writ. *United States v. Orozco-Ramirez*, 211 F.3d 862, 867 (5th Cir. 2000). A motion is not successive if the prior motions were denied on purely procedural grounds. In his motion for reconsideration of the Court's Order, Petitioner argues that his May 18, 1998, application for writ of coram nobis, which this Court denied and has now construed as a motion to vacate, was denied for procedural reasons and therefore cannot be the basis for a finding that the current section 2255 motion is successive.

The difficulty in deciding this question arises from the admittedly ambiguous order issued by the Court in denying Petitioner's May 18, 1998, application for a writ of coram nobis as to Count IV of his indictment. The Court denied that motion "after considering the motion, and the file of this cause." *See Court Order*, July 8, 1998. The Court did not, in its July 8 Order, as it had in its May 1, 1998, Order dismissing other applications for relief, suggest that the dismissal was without prejudice to refiling. The quoted language comes directly from 28 U.S.C. section 2255, which states that a court may deny a motion to vacate on the record and without a hearing, if the record clearly reflects that the motion is not meritorious. A dismissal of a section 2255 motion made "after considering the motion, and the file" is a dismissal on the merits, even though no evidentiary hearing was held. *See Sanders v. United States*, 373 U.S. 1, 16 (1963); *United States v. Kearney*, 682 F.2d 214, 221 (D.C. Cir. 1982).

However, the Petitioner suggests that the Court did not have jurisdiction to dismiss the May 18 application on its merits. This suggestion is correct. The Fifth Circuit has held that a district court may not decide a section 2255 motion on its merits while a direct appeal is pending. *See Jones v. United States*, 453 F.2d 351, 352 (5th Cir. 1972). When the Fifth Circuit affirmed the July 8, 1999, Order, it did so specifically because of this want of jurisdiction. *See United States v. Cluck*, No. 98-50440 and 98-50682 (July 27, 1998).

It is true that Petitioner filed two additional applications for writs of coram nobis with this Court on July 24 and July 28, 1998, which also sought as partial relief the vacating of Petitioner's sentence. On August 11, 1998, *after* the denial of Petitioner's direct appeal by the Fifth Circuit, this Court denied those motions, apparently on their merits. *See Court Order*, August 11, 1998. Thus, this Court might conceivably find that, even if the May 18 motion could not have been decided on its merits, there was nothing to prevent the Court from denying the July 24 and 28 applications on their merits, with prejudice, because the Petitioner's appeal had been decided against him. This Court might also then conclude that the issues Petitioner now raises could have been raised in those motions and thus find that this petition is successive. *Orozco-Ramirez*, 211 F.3d at 867. However, such a result, in the Court's view, would not be fair. In its May 1, 1998, Order denying Petitioner relief on questions that are substantially similar to those presented here, the Court stated that those claims were dismissed subject to reurging because of the pending of the Petitioner's appeal. The

Court will not now fault the Petitioner for failing to raise the issues in another pre-appeal application.

In addition, the Court disagrees with the Magistrate's conclusion that this motion is successive to a federal habeas action filed in the United States District Court for the Southern District of Texas. *See* Docket No. C-99-CV-277. That action was filed pursuant to 28 U.S.C. section 2241 and sought relief from an alleged wrongful detention. The case has been treated as a habeas corpus case by the court hearing it and has been dismissed without prejudice on a finding that the Petitioner failed to exhaust his administrative remedies. Habeas relief and relief under 28 U.S.C. section 2255 are separate and distinct. *See Kinder v. Purdy*, 222 F.3d 209, 212 (5th Cir. 2000) (distinguishing causes of action). Thus, the Corpus Christi claim does not bar the instant section 2255 motion. *See Chambers v. United States*, 206 F.3d 472, 475 (2d Cir. 1997).

However, the Court agrees with the Government that the issues raised in the current motion either were raised in Petitioner's direct appeal or could have been raised in that appeal. That appeal centered on three basic issues: the adequacy the indictment, the fairness of the restitution order, and the sufficiency of the evidence against the Petitioner. The issues raised in the current motion are the adequacy of the indictment and the fairness of the restitution order. To the extent that the issues here are not *identical* to those raised at the Fifth Circuit, the Petitioner has not demonstrated why he failed to raise them in his appeal or actual prejudice stemming from the alleged errors. *See United States v. Placente*, 81 F.3d 555, (5th Cir. 1996). Therefore the Court cannot reach the merits of the

Petitioner's motion and will again deny the section 2255 motion. It follows, then, that the Petitioner's request that the Court enter his requested findings will also be denied. Remaining for the Court's determination is whether a certificate of appealability (COA) is warranted.

When reviewing a request for a COA, a court is required to determine whether the petitioner has made a "substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). To make such a showing, the petitioner must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different matter or that the issues presented were adequate to deserve encouragement to proceed further." *Barrientes v. Johnson*, No. 98-40348, 2000 WL 1099389, at *27 (5th Cir. Aug. 7, 2000).

Where a petition has been dismissed on procedural grounds, as in this case, a court must determine whether the petitioner has shown that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 120 S.Ct. 1595, 1604 (2000). A court may find that it can first resolve the issue "whose answer is more apparent from the record and arguments" and grant or deny the application on that basis. *Id.* The Court concludes here that there is a clear bar to its consideration of this case on the merits, over which reasonable jurists would not disagree, and on that basis the Court denies the application for a COA. Further, having examined the substantive issues raised in the Petitioner's motion for reconsideration, the

Court is persuaded that he has not made a substantial showing of the denial of a constitutional right.

ACCORDINGLY, it is ORDERED that the motion for reconsideration (Docket No. 312) is GRANTED, in PART, as discussed in this Order. The section 2255 motion is again DENIED, and the motions asking the Court to make findings of fact and conclusions of law and requesting a certificate of appealability (Docket Nos. 313 and 314) are DENIED.

SIGNED and ENTERED this 25th day of Sept., 2000.

/s/ Edward C. Frado
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ELWOOD "JACK" CLUCK, Plaintiff,	)	
VS.	)	Criminal Action SA 95 CR 99 EP
UNITED STATES OF AMERICA, Defendant.	)	Civil Action No. SA-99-CA-1417-EP

ORDER

(Filed Nov. 3, 2000)

On this date the Court considered Petitioner's motion to reconsider this Court's September 25, 2000, Order denying Petitioner's motion to vacate and set aside his conviction. After careful consideration, the Court sees no grounds for reconsideration of that Order. The motion is therefore DENIED.

IT IS SO ORDERED.

SIGNED and ENTERED this 3rd day of Nov., 2000.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ELWOOD "JACK" CLUCK, Plaintiff,	)	Civil Action No. SA-99-CA-1417-EP
VS.	)	
UNITED STATES OF AMERICA, Defendant.	)	Criminal Action No. SA-95-CR-99(1)-EP

ORDER

(Filed Dec. 14, 2000)

On this date the Court considered Petitioner's various motions that this Court enter findings of fact and conclusions of law and that this Court rule on those motions expeditiously. The Court, having reviewed the record and its Orders, concludes that it has made sufficient findings to support its conclusion that the Petitioner's section 2255 request that his sentence be vacated or that he be granted a new trial is barred on procedural grounds, as it raises issues that were or could have been raised on direct appeal. Thus, the Court DENIES the relief requested (Docket Nos. 313 and 320-23).

IT IS SO ORDERED.

SIGNED and ENTERED this 14th day of Dec., 2000.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50952
USDC No. SA-99-CV-1417
USDC No. SA-95-CR-99-ALL EP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELWOOD CLUCK, also known as
Jack Cluck

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas

(Filed Apr. 3, 2001)

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

BY THE COURT:

Elwood Cluck appeals the district court's dismissal of his 28 U.S.C. § 2255 motion and the district court's subsequent denial of his second motion for reconsideration. This court has a duty, *sua sponte* if necessary, to determine whether it has appellate jurisdiction. *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987).

Initially, the district court dismissed Cluck's 28 U.S.C. § 2255 motion as successive. Cluck filed his first motion for reconsideration, which we construe as a Fed. R. Civ. P. 60(b) motion. *See Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 371 n.10 (5th Cir. 1998). After Cluck filed his notice of appeal from the court's initial dismissal, the district court granted in part Cluck's first motion for reconsideration, reversing its decision that the motion was successive and determining that Cluck was procedurally barred from the raising claims that either had been raised on direct appeal or could have been raised on appeal.

Although we have jurisdiction over Cluck's timely notice of appeal from the district court's initial judgment dismissing his 28 U.S.C. § 2255 motion as successive, the appeal from the district court's denial of the second motion for reconsideration is a nullity because the district court was without jurisdiction to issue its two postjudgment orders. *See Winchester v. United States Atty. for Southern Dist. of Texas*, 68 F.3d 947, 948-49 (5th Cir. 1995).

Following the procedure established in *Willie v. Continental Oil Co.*, 746 F.2d 1041, 1046 (5th Cir. 1984), *vacated*, 760 F.2d 87 (5th Cir. 1985), *rev'd on other grounds*, 784 F.2d 706 (5th Cir. 1986) (en banc), we construe the district court's partial grant of postjudgment relief as a request for leave from this court to grant such relief, which we GRANT. The case is REMANDED to the district court for the reentry of its order previously entered on September 27, 2000. Upon such entry of the order and the filing of a notice of appeal from the newly entered judgment, the clerk of this court shall consolidate the appeals.

Cluck's motions for a certificate of appealability (COA), leave to file supplemental brief in support of COA, and leave to dispense with filing fee are HELD IN ABEYANCE.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ELWOOD "JACK" CLUCK, Movant,	)	
VS.	)	Civil Action No. SA-99-CA-1417-EP
UNITED STATES OF AMERICA, Respondent.	)	(Criminal Action No. SA-95-CR-99(1)-EP)

ORDER

(Filed May 24, 2001)

Previously, the movant in the above numbered and styled cause appealed this Court's order dismissing his motion to set aside sentence and denying of his second motion for reconsideration. Subsequently, the United States Court of Appeals for the Fifth Circuit determined that because this Court did not have jurisdiction to issue two post-judgment orders, the order denying the movant's second motion for reconsideration was a nullity. Consequently, the Court of Appeals remanded this cause and directed this Court to re-enter the order it entered on September 25, 2000.

Since that time, the movant filed a motion wherein he asked this Court to vacate his sentence in his criminal cause. This Court's jurisdiction, however, is limited to the scope of the remand. *U.S. v. Becerra*, 155 F.3d 740, 753 (5th Cir. 1998). The Court of Appeals was explicit in what must be done in this case. This Court will act accordingly. Therefore, the movant's Motion for Entry of Judgment

(docket entry #327) is DENIED and the Court's order dated September 25, 2000 is RE-ENTERED.

SIGNED and ENTERED this 24th day of May, 2001.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ELWOOD "JACK" CLUCK, Movant,	)	
VS.	)	Civil Action No. SA-99-CA-1417-EP
UNITED STATES OF AMERICA, Respondent.	)	(Criminal Action No. SA-95-CR-99(1)-EP)

ORDER

(Filed Jun. 12, 2001)

On May 24, 2001, this Court complied with an order by the United States Court of Appeals for the Fifth Circuit and re-entered its order dated September 25, 2000. Since that time, the petitioner filed a motion asking this Court to enter findings of fact and conclusions of law in respect to that action. Therein, the petitioner enumerated numerous findings of fact and conclusions of law that he wanted this Court to enter. The petitioner also filed a motion asking for a supplemental certificate of appealability. Therein, the petitioner reiterated his earlier arguments about why he believes he is entitled to a certificate of appealability. The petitioner filed another motion asking the Court to rule on his motion for findings of fact.

The Court's order dated May 24, 2001 explained why the Court's earlier order was re-entered. As a result, the Court need not enter findings of fact and conclusions of law. Accordingly, the Court GRANTS the petitioner's

motion for a ruling (docket entry #333) and DENIES the motion for findings of fact (docket entry #332).

The Court's order dated September 25, 2000, explained the Court's reasons for denying the petitioner's motion for a certificate of appealability. Those reasons also apply to the petitioner's request for a supplemental certificate of appealability. For the reasons set forth in the September 25, 2000 order, the petitioner has not made a substantial showing of the denial of a constitutional right. As a result, the Court's [sic] DENIES the petitioner's request for a supplemental certificate of appealability (docket entry #334).

SIGNED and ENTERED this 12th day of June, 2001.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES DISTRICT JUDGE